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DEPARTMENT FOR S/WCI - PROSPER/RICHARD, EUR/SCE -  
STEPHENS/GREGORIAN/MITCHELL, L/EUR - LAHNE, INR/WCAD -  
SEIDENSTRICKER/MORIN, USUN FOR ROSTOW/WILLSON

E.O. 12958: DECL: 5 YEARS AFTER ICTY CLOSURE

TAGS: [BK](#) [HR](#) [KAWC](#) [NL](#) [PHUM](#) [PREL](#) [SR](#) [ICTY](#)

SUBJECT: ICTY: MILOSEVIC PROSECUTION LIMPS TO CLOSE ITS CASE

Classified By: Deputy Legal Counselor David Kaye per reasons 1.5 (b)-(d)  
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[11.](#) (C) Summary. The Milosevic Prosecution team of the International Criminal Tribunal for the Former Yugoslavia (ICTY) closed its case in the anti-climactic form of a motion to Trial Chamber III on February 25. The recent melodrama of the Milosevic prosecution -- the rancorous internal debates over potential witnesses such as Biljana Plavsic, the expectations of introducing what some considered "smoking gun" documents, the dramatic deterioration in Presiding Judge Richard May's health, a return to illness for the accused, the near-resignation of lead Prosecutor Geoffrey Nice -- had turned the prosecution into what Nice called "a muddle". The Prosecution is now trying to clean its own house and turn its attention to wrap-up elements of its case and preparations for the defense phase, which the trial chamber scheduled to begin on June 8. The uncertainties of the past weeks overshadowed some interesting evidence adduced in the final weeks of the proceedings. End summary.

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The Anticlimactic Closing  
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[12.](#) (C) Prosecutors filed on February 25 a "notification of the completion of its case and motion for the admission of evidence in written form" with trial chamber III. While the bulk of the motion deals with some evidentiary wrap-up issues, the motion leads off by noting "with great regret" the illness and resignation of Judge May, which although effective May 31 was announced by President Theodor Meron on February 22. (NB: It is understood that Judge May is no longer participating in the trial chamber's substantive deliberations and that Judge Patrick Robinson, the next senior judge in the trial chamber, is likely to be bumped up to preside.) It went on to suggest that "the resignation may pose serious difficulties for the overall timetable of the case," though such difficulties "are not entirely predictable" at this time. It suggested that the difficulties may delay the start of the accused's case and could be due in part to the need of a newly assigned judge to become familiar with the case (noting the relevance of Rule 15bis of the Rules of Procedure and Evidence). It concluded its short introductory section by saying that, "(w)ith these considerations in mind and with concern for the due administration of justice and judicial economy the Prosecutor closes the case by this filing on the basis of all evidence already adduced . . ."

[13.](#) (U) The trial chamber responded unprecedentedly quickly to the motion, suggesting that the kabuki had been rehearsed. According to an ICTY press release, the trial chamber "confirmed that 'the Prosecution case is hereby closed.'" It made several further noteworthy orders:  
-- The trial chamber ordered that "any motion under Rule 98bis shall be filed by the Accused or Amici Curiae by Monday, 8 March 2004," to which the Prosecution shall respond by March 22. A Rule 98bis motion is a motion for summary judgment, according to which the accused/amici may seek acquittal on "one or more of the offences charged in the indictment".  
-- It required the accused to produce a list of witnesses he intends to call and exhibits he intends to offer by April 12.  
-- It scheduled a "pre-defence conference" for May 17, 2004.  
-- It scheduled the commencement of the defense case for Tuesday, June 8, giving the accused 150 days to present his case. (At three days per week, the allotment of days amounts to nearly one year; based on holidays and other anticipated weeks off due to sickness or other difficulties, it should be expected that the defense -- assuming use of all 150 days is made -- would extend well into the summer of 2005, if not beyond.)

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The Tumult of Recent Weeks  
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[14.](#) (C) Senior prosecutors and investigators shared with embassy legal officers in recent days their disappointment in the closing weeks of the case. Geoffrey Nice called it "a

muddle" and said that the past three weeks -- during which he vigorously sought a revelation of Judge May's situation to the accused -- were the hardest of the two-year-plus trial for him. Because of the internal battles, especially with Carla Del Ponte over whether the prosecution had an ethical obligation to advise the accused of Judge May's likely resignation, he expected as of the end of last week that he would resign the case. May's resignation, however, has put that trouble behind them, and he said that he and Del Ponte were "in a period of dtente." Dtente or not, Nice expects further friction with Del Ponte, who has participated more actively in Milosevic team's trial decisions since the new year than she had ever done previously. For her part, Del Ponte told Embassy Legal Counselor that she had "worked well" with President Meron on the May situation and that she had to show Nice that she was the boss.

15. (C) At the heart of internal troubles on the team was Nice's relationship with senior trial attorney (STA) Dermot Groome. While there is little sign that the relationship has improved, Groome told embassy legal officer late February 26 that Del Ponte has asked him to oversee the Bosnia portion of the defense case. As a result, he feels confident now that he will remain on the Milosevic team beyond May, when his contract expires.

16. (C) Other prosecutors and investigators were disappointed with their inability to introduce further evidence into the record. Biljana Plavsic, for instance, had been scheduled to testify at the beginning of February, but the accused's illness and strenuous debate within the Milosevic team put it off to a point where the team realized that it would not be possible to call her. Similarly, there was hope that the prosecution would call Carl Bildt; in the absence of such an opportunity, the prosecution, with Bildt's apparent consent, is likely to ask the trial chamber to call Bildt as a court witness. According to STA Groome, a key insider had been set to testify this week on Belgrade-Pale connections, while some expert testimony by a demographer would have demonstrated the "ethnic cleansing" effects of Republika Srpska Army (VRS) actions. Some of the evidence, Groome hopes, will be introduced during a short rebuttal phase of the proceedings following the defense.

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Looking Ahead to the Defense  
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17. (C) Several members of the prosecution team are now looking ahead and preparing for the defense phase. Lead among them is STA Groome, who told emboff that Milosevic apparently does intend to submit a witness list of 900 individuals. Groome's main interest will be in undermining, at a very early stage, the credibility of the witnesses Milosevic calls. He noted that in the Brdanin case, prosecutors so effectively undermined the defense witnesses that the defense ultimately rested without calling over fifty individuals on its witness list. Groome hopes that he can obtain a "demonstration effect" so that Milosevic understands that his witnesses are not giving him the help he needs.

18. (C) Groome and others also believe that they will have far beyond June 8 until the defense case begins. Two main problems exist: First, it remains unclear when the replacement judge for Judge May will join the chamber. While there is some discussion of finding a judge who can "read into" the case even before an official appointment, Nice and Groome have identified a host of problems with such an approach, including funding. Secondly, a new judge will have nearly 50,000 pages of documents to review, following which he or she will need to "certify" familiarity with the case. Finally, the summer recess would intrude just as the defense begins. All in all, Groome believes the defense case will not in fact begin until well into September, if that.

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Final Witness Testimony  
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19. (SBU) Despite the tumult of recent weeks, the prosecution was able to put on some important witnesses during the final days of its case-in-chief, focusing on Srebrenica. The prosecution used witness testimony to establish that Milosevic had knowledge of the siege of the city, that JNA troops were complicit, and that Milosevic had the control and influence to reign in the Bosnian Serbs. Witnesses during the last week of the case included General Phillipe Morillon, the French UNPROFOR commander who famously promised the Bosnians in Srebrenica that the UN would "never abandon them." Also testifying was the Venezuelan perm rep to the UN during the war in Bosnia, who in his testimony sharply criticized the UN for not doing more to prevent genocide in Bosnia.

110. (C) Throughout the last week, after a week's postponement due to illness of the accused, Judges Robinson

presided over a Chamber that included only himself and Judge Kwan. The only allusion made to Judge May's empty chair was Robinson's comment that Judge May was "indisposed" and that he and Judge Kwan were sitting pursuant to Rule 15 bis (which authorizes that, in light of the illness of a judge for a short duration, the remaining judges can continue to hear the case for a period not to exceed 5 working days). Robinson was somewhat more tolerant of Milosevic's speech-making than May had been, periodically interrupting or stating quietly, "it is time to ask the witness a question now, Mr. Milosevic." Judge Robinson has also been very accommodating to Milosevic's requests for more time for cross-examination, where Judge May was normally stingy in giving additional time. Still, Robinson showed some skill in controlling Milosevic and seeing the proceedings through the completion of this phase.

11. (SBU) Testimony of General Philippe Morillon (Former Commander of UNPROFOR): In his capacity as commander of UNPROFOR between 1992 and 1993, Morillon went to Srebrenica to assess the humanitarian situation of the tens of thousands of Muslim civilians who had fled there to escape the Serb offensive in surrounding areas. Morillon made the visit to Srebrenica in March 1993, when the city was surrounded by hostile Bosnian Serb forces. Following his visit, Morillon met with Milosevic in Belgrade and warned him that a terrible tragedy would take place in Srebrenica if Milosevic did not intervene. (Morillon refused to be specific about how he knew a tragedy was imminent, but during that period the Muslims could no longer hold their defensive positions against the Serbs, and the town was also on the brink of starvation). According to Morillon, Milosevic was able to clamp down on Bosnian Serb military commander Ratko Mladic, whose troops were poised to take the town. The implication is that Milosevic had some level of authority over Bosnian Serb leadership and was able to temporarily avert Srebrenica's fall to the Bosnian Serbs. Milosevic countered that it was Mladic who was responsible for the siege of Srebrenica and the subsequent massacre of its people in 1995, to which Morillon retorted, "Mladic obeyed none but himself, but when I went to Belgrade, I went to save the people of Srebrenica, and he was still obeying you. He stopped obeying you. But thanks to you, I was able to meet with him in Belgrade." Morillon also testified that he sought Milosevic's aid to stop the Bosnian Serb shelling of Sarajevo temporarily. For the prosecution, his testimony seemed to be a mixed blessing because, while he was clear that Milosevic initially exerted influence over Mladic in 1993, he was muddled over whether Milosevic could control Mladic in the lead-up to the Srebrenica massacre of 1995.

12. (C) Morillon's testimony was both compelling and emotional. When he traveled to Srebrenica in March 1993, he was effectively taken hostage by the Bosnian leadership there and released only when he promised to go to Belgrade and negotiate an end to the Serb assault. While in Srebrenica, he gained notoriety by unilaterally promising UN support to the besieged population, walking onto a public balcony and proclaiming into a loudspeaker "I will never abandon you", an act which ultimately forced the UN to designate Srebrenica as a UN "safe haven." Morillon's anger and feeling of personal responsibility for the massacres in July 1995 around Srebrenica was palpable in his testimony. During cross examination, for example, he angrily told Milosevic, "History will tell that you are one of those responsible for having sowed this fear, for having armed, for having pushed those who were unleashed, became enraged and escaped your control."

13. (SBU) Diego Enrique Arria (Venezuelan permrep to the UN): Arria served as Venezuela's permanent representative to the UN during the war in Bosnia. The prosecution's primary interest in Arria was his testimony that Milosevic knew about extremely inhumane conditions in Srebrenica. Through Arria, the prosecution introduced into evidence numerous reports reviewed by the UN Security Council (UNSC) that documented inhumane conditions, ethnic cleansing, and other crimes against the Bosnian Muslims in Srebrenica, including letters from the UN High Commissioner for Refugees and a ruling from the ICJ requiring the Federal Republic of Yugoslavia to take immediate action to prevent genocide from occurring in Bosnia. Arria testified that the Yugoslav ambassador to the UN prepared informed reports about this documentation, indicating that all of the information reviewed in the UNSC was available to the accused. The testimony serves as evidence that Milosevic had notice that the Bosnian Serbs were on the brink of committing genocide in Srebrenica in 1993; it also serves as a serious condemnation of the UN and the international community, who were also on notice about the imminence of the genocide (Arria characterized it as "slow motion genocide") but allegedly remained largely indifferent to the conflict. In the course of his testimony, Arria made harsh accusations against the UN, stating that the international community paid more attention to the Iraqi invasion of Kuwait and did nothing to protect Bosnia because it feared the presence of a Muslim state in Europe.

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¶14. (C) The Prosecution case against Slobodan Milosevic ended with a barely audible whimper. Prosecutors were too busy licking their wounds from bruising internal battles while the remaining Milosevic investigators (and STAs on other teams) could only shake their heads in disbelief at the self-destructive antics. While the team appears to have moved into a general period of, in Nice's word, dtente, the poor handling of the closing weeks does not bode particularly well for the next phase of the case. On the other hand, Groome's remaining on the team would appear to provide the team with a vision and the wherewithal to deal with the dozens of witnesses Milosevic is likely to call to his defense. One can only hope that Nice and Groome in particular can find an m.o. according to which they can operative effectively.

¶15. (C) Beyond the prosecution, however, the chambers now face a new set of priorities, the resolution of which could have a major impact in how the trial is viewed beyond The Hague. First among them is finding a replacement for Judge May. Just how that will be done in the light of an end-of-May effective date for the resignation is unclear, and we have some concern that it has not been well thought through. For instance, if his resignation is only effective May 31, it remains difficult for a judge to be selected before then to replace him on the trial chamber. As a result, one can expect delays well beyond June as a new judge is selected (or elected by the UN General Assembly) and then familiarizes himself or herself with the thousands of pages of transcripts and evidence introduced since the trial began over two years ago. Moreover, one can only speculate as to how Milosevic or the amici will respond to May's departure. The trial may continue "only . . . with the consent of the accused," according to Rule 15bis, which Milosevic is unlikely to give in light of his long-stated non-recognition of the Tribunal's legitimacy. In that case, the remaining judges may continue the trial "if, taking all the circumstances into account, they determine unanimously that doing so would serve the interests of justice." Such a determination is subject to appeal "by either party," and one might expect that the amici will be given leave to make such an appeal if Milosevic does not do so. In any event, the June start-date of the defense case would appear unrealistic.

¶16. (C) Even apart from the final days of crisis at the Tribunal, observers are already assessing whether the prosecution did what it had to do to obtain a conviction on some or all of the counts of the indictment. Some clarity in this respect may come with the summary judgment motion likely to be filed by the amici and the response to be filed by the prosecution, giving observers a useful opportunity to see whether the chambers believe the prosecution made out at least a prima facie case on key counts of the indictment. (Even here, however, May's departure raises a concern as to whether a two-judge chamber can rule on the summary judgment motion, or whether judgment on the motions may be delayed until long after a replacement judge comes on board.) Many consider the Kosovo case to have been made exceptionally well, the Croatia case somewhat less so, and while the Bosnia case was also well-done, it presented the prosecution with its most difficult evidentiary tasks of all.

¶17. (C) Nice in particular is fond of reciting his concern for the place of the Milosevic prosecution in the history books. One hopes that his prosecution team will use the months ahead not only to reflect on the history of the trial's close, but also whether there are any lessons that they may apply to conclude the case in a less rancorous, more effective way.

SOBEL